Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
BellSouth Telecommunications, Inc.	)	
Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Service by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to CLEC UNE Voice Customers	)	**WC Docket No. 03-251**

COMMENTS OF MCI

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Pursuant to the Commission's *Public Notice* and extension of time for filing comments,[1] MCI respectfully submits these comments on BellSouth's "Emergency Request for a Declaratory Ruling."

INTRODUCTION AND SUMMARY

BellSouth's petition promotes an anticompetitive practice that it does not even attempt to defend, and it mischaracterizes the preemption law which it seeks to use to shield this conduct from scrutiny. The petition should be denied.

The practice BellSouth asks the FCC to bless is this: It disconnects the service of its DSL customers who choose a competitor's local voice service. Many of these customers have no alternative broadband Internet access service and therefore must remain with BellSouth's narrowband voice offering if they wish to retain a broadband connection. Even when alternatives

[1] *See* Public Notice, *Pleading Cycle Established for Comments on BellSouth's Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Such Services to CLEC Voice Customers*, WC Docket No. 03-251 (Dec. 16, 2003); *Order*, WC Docket No. 03-251 (Dec. 30, 2003).

exist, BellSouth here exploits a tie-in between its DSL services and its ISP services, and the absence of any portability among ISP services. As a result, a change in broadband provider invariably means new equipment, new e-mail addresses, new web-pages, and disconnect and reconnect fees. Only consumers deeply dissatisfied with their broadband service are willing even to contemplate such a change, making BellSouth's tying especially effective.

BellSouth's practice is anticompetitive – it directly targets competitive narrowband voice services, and so it is conduct that could not be more at odds with the terms and purposes of the federal 1996 Act. The longer-term implications of BellSouth's practice are more ominous still. By tying broadband services to its narrowband voice services, BellSouth's practice is a crude effort to preserve its narrowband voice monopoly by requiring broadband consumers that might one day otherwise choose broadband Voice over Internet Telephony ("VoIP") voice service to pay for a narrowband voice service they will no longer want or need. In this way BellSouth's practice is directly in the teeth of this Commission's principal policy initiative – the promotion of broadband. Well aware that VoIP may be the "killer app" that spurs the broadband deployment that this Commission is promoting, BellSouth is using illegal tying to preserve its narrowband voice network and kill that "killer app." It won't work, but the idea that the Commission should step in and assist BellSouth in its attempt to preserve the value of its narrowband voice network in this way is difficult to countenance.

The claim that this Commission *should* promote this tying practice as part of national telecommunications policy is so ridiculous that BellSouth doesn't even make it. The claim that the Commission has done so inadvertently or otherwise in the *Triennial Review Order* ("*TRO*") or anywhere else is equally ridiculous. States that stop this practice violate no federal policy. In particular, nothing in the *Triennial Review Order* sanctions this anticompetitive practice or indicates that it is exclusively subject to federal oversight. The claim that states in any event have no power to act to stop such anticompetitive conduct in their state's local telephone market -- over which they have had regulatory responsibility for over a century -- is equally absurd. It is hard to imagine a less defensible practice, or a less meritorious petition.

ARGUMENT

I. BELLSOUTH'S PRACTICE IS ANTICOMPETITIVE

The state orders under review restrict BellSouth's "practice to discontinue FastAccess [Internet] service to those customers who migrate their local voice service from BellSouth to a CLEC where the CLEC provides local voice service using UNE-P or UNE-L."[2] The state orders also proscribe BellSouth's refusal to provide its DSL service to customers of competing voice service providers. After extensive evidentiary proceedings, each state PSC found that BellSouth's practice was without commercial justification, was not required by any technical characteristic of its network, and impeded competition in local telephone markets.[3] Here BellSouth disputes none of these conclusions.

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[2] *Complaint of Florida Competitive Carriers Association Against BellSouth Telecommunications, Inc. Regarding BellSouth's Practice of Refusing to Provide FastAccess Internet Service To Customers Who Receive Voice Service From A Competitive Voice Providers, And Request For Expedited Relief*, Docket No. 020507-TL, at 18 (Fla. PSC Nov. 20, 2003) ("*Florida PSC Staff Recommendation*"); *see also, e.g., Petition of Cinergy Communications Co. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C. Section 252*, Case No. 2001-00432, at 8 (Ky. PSC July 12, 2002).

[3] *See, e.g., BellSouth Telecomms. Inc. v. Cinergy*, No. Civ. A. 03-23-JMH, __F. Supp. 2d __, 2003 WL 23139419, at *7 (E.D. Ky. Dec. 29, 2003) ("Cinergy offered voluminous testimony describing BellSouth's anticompetitive practices and explaining how they would cripple Cinergy's ability to compete in the local voice market."); *Georgia PSC Order*, No. 11901-U, at 16-17 (summarizing evidence of anticompetitive effect by MCI and CUC); *Florida PSC Staff Recommendation*, No. 020507-TL, at 21-27, 42-47, 56-61 (summarizing evidence of anticompetitive effect).

BellSouth's practice locks in narrowband voice customers so effectively that "it is difficult for a CLEC to entice a customer away from BellSouth once that customer has FastAccess." *Florida PSC Staff Recommendation*, No. 020507-TL, at 46. The Florida PSC Staff concluded from the witness testimony "that [BellSouth's] practice effectively keeps customers from switching" and that "BellSouth adopt[ed] its practice to keep customers from switching voice service." *Florida PSC Staff Recommendation*, No. 020507-TL, at 45. The Georgia PSC similarly concluded that BellSouth uses the tying arrangement to "insulate [its] voice service from competition because customers that would like to switch to a preferred CLEC for voice service have a disincentive to do so." *Georgia PSC Order*, No. 11901-U, at 16. Testimony from carrier after carrier supported these conclusions. Small business customers, in particular, were unwilling to consider another voice provider when they believed that switching from BellSouth's service might lead to a disruption in their email communications and Internet access.[4]

Some customers are locked in because they have no alternative: BellSouth is the only available broadband provider. Particularly, for many small and medium sized businesses who are not served by cable modem service, BellSouth is the only broadband choice. Thus, if they use a competitive local voice provider, they are unable to obtain broadband services.

The lock-out is almost as effective even when there is another broadband provider. The state commissions found that even when these options exist, the many impediments to switching

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[4] *See, e.g.*, FDN Answer Br., *BellSouth Telecomms., Inc. v. FDN, Inc.*, No. 4:03 CV 212-RH/WCS, at 32-36 (filed Nov. 7, 2003) (summarizing record evidence); Florida PSC Answer Br., *BellSouth Telecomms., Inc. v. FDN, Inc.*, No. 4:03 CV 212-RH/WCS, at 31-34 (filed Nov. 7, 2003); MCI's Post-Hearing Br., *Complaint of MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. Against BellSouth Telecommunications, Inc.*, Docket No. 11901-U, at 8-10, 12-16 (filed Apr. 29, 2002); Cinergy Br., *BellSouth Telecomms., Inc. v. Cinergy Communications Co.*, No. 02-23-JMH, at 36-38 (filed Aug. 15, 2003); *Amici* Br. of AT&T Corp. and MCImetro Access Transmission Services, *BellSouth v. Cinergy*, 2003 WL 23139419, at 23-25 (filed Aug. 15, 2003).

broadband providers made these options impractical. "Although BellSouth claims that the CLECs have options for providing their own DSL service, it is clear from the record, that as a practical matter, these are not reasonable, viable options." *Florida Staff Recommendation*, No. 020507-TL, at 44.[5] "[S]witching out of BellSouth's DSL service to another mode of high speed Internet service would require 'disconnecting FastAccess service, obtaining a different DSL modem, and probably having to pay early termination fees.'" *Georgia PSC Order*, No. 11901-U, at 16 (quoting MCI witness Sherry Lichtenberg); *see also Florida Staff Recommendation*, No. 020507-TL, at 55 ("the customer must disconnect his FastAccess, obtain a different DSL modem, and likely change his e-mail address") (citing Tr. at 167). "[T]he customer would have to establish broadband service with a different provider, incur any connection fees, change his or her email address, and notify his or her contacts of that change." *Georgia PSC Order*, No. 11901-U, at 16 (citing Tr. at 25); *see also Florida PSC Staff Recommendation*, No. 020507-TL, at 23 (citing Tr. at 55). As was noted in the Georgia proceeding, customers "who have grown accustomed to BellSouth's DSL service are not likely to forfeit these features in order to switch to a preferred voice provider." *Georgia PSC Order*, No. 11901-U, at 17.

Assessing these facts, each of these PSCs determined that BellSouth violated state communications law because its "practice of tying its DSL service to its own voice service to increase its already considerable market power in the voice market has a chilling effect on competition and limits the prerogative of . . . customers to choose their own telecommunications carriers." *Kentucky PSC July 12, 2002 Order* at 7.

[5] *See also Georgia PSC Order*, No. 11901-U, at 7-8, 17 (finding alternatives such as resale, cable modems, CLEC DSL service and line splitting effectively unavailable, and that "the alternatives to BellSouth's DSL service do not substantially diminish the anticompetitive impact of BellSouth's policy on local voice competition").

The evidence on this point was overwhelming. In Georgia, the evidence showed that more than 4,900 Georgia customers had declined MCI's service only because they did not wish to have their BellSouth DSL service disconnected. *See* MCI's Post-Hearing Br., *Complaint of MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. Against BellSouth Telecommunications, Inc.*, Docket No. 11901-U, at 9 (filed Apr. 29, 2002) (citing Tr. at 38-39, 75).

In Kentucky, Cinergy offered voluminous testimony describing BellSouth's anticompetitive practices and explaining how they would cripple Cinergy's ability to compete in the local voice market. Cinergy showed that, when its customers call BellSouth to ask about DSL service, BellSouth tells the customer it must return local phone service to BellSouth to get BellSouth's DSL service. (Heck Direct at 12; *accord* Heck Dep. at 33-35.) The unrebutted testimony also proved that BellSouth cancels its customer's DSL Internet service when that customer attempts to move voice service to Cinergy. (Heck Direct at 14.) And Cinergy has failed to secure numerous voice customers to BellSouth as a result of these practices because "[o]nce a customer learns that they will lose their ADSL Internet service by moving to [Cinergy's] local voice service[,] they are no longer willing" to become a Cinergy voice customer. (*Id.*; Heck Dep. at 31-33, 35-36.) As Cinergy explained, the ultimate effect of BellSouth's conduct will be to "remonopolize" the local voice market. (*See* Heck Direct at 5, 9, 36; Heck Revised Rebuttal at 25-26.)

In Louisiana, the record similarly demonstrated that BellSouth had successfully blocked competitors' access to customers by assigning DSL service to a customer's primary line. (*E.g.*, Jan. 18, 2002 KMC Initial Comments at 3, R. 1211; Jan. 18, 2002 Xspedius Comments at 1, R. 1247.) As the CLECs explained, BellSouth's control of the primary line prevents competitors from serving any secondary lines as all incoming calls are directed initially to the primary line. (Jan. 18, 2002 KMC Initial Comments at 3, R. 1211; Jan. 18, 2002 Xspedius Comments at 1, R. 1247.) Other comments described how BellSouth's billing practices erected barriers to competition by requiring customers either to pay for their DSL service using a credit card or to switch their voice service back to BellSouth. (Jan. 18, 2002 ACCESS Initial Comments at 2, R. 1235.) When faced with this option, customers "typically switch back to BellSouth because their billing systems require invoices and lack procedures to pay for service by credit card." (*Id.*) In addition, the record established that BellSouth engaged in the practice of placing certain service codes on customer accounts (regardless whether that customer actually receives DSL service from BellSouth or is simply "eligible" to receive such service) to prevent the transfer of that customer's voice service to a competing carrier. (Dec. 21, 2001 Letter from Network Telephone, R. 1286-87.) As this evidence demonstrated, BellSouth deliberately configures its wholesale ordering system so that it rejects otherwise valid orders to switch a customer's voice service to a competitive carrier. (Aug. 23, 2002 KMC Telecom Reply Comments at 2.)

In Louisiana, BellSouth rejects CLEC orders to provide voice service if the customer's record contains the BellSouth DSL service code. (May 24, 2002 KMC Telecom Reply Comments at 2-3, R. 1152-53.) The CLEC must thereafter inform its prospective voice customer that he or she must contact BellSouth to remove the code before the CLEC can even submit the order for voice service. (*Id.*) If the customer has DSL service, the CLEC must inform the customer that he or she must disconnect BellSouth's DSL service before the CLEC can submit the service order. (*Id.*) By requiring customers to become entangled in the process of removing these service order codes from their accounts, BellSouth creates a "significant disincentive" for the customer to migrate to a CLEC's service. (*Id.*) As the CLEC commenters showed, customers have decided against migrating to a CLEC's service because "BellSouth delayed too long and made it too difficult to switch carriers." (*Id.*) BellSouth's own witness in the Louisiana action conceded that in May 2002, BellSouth rejected 204 orders because these DSL ordering codes were placed on customers' accounts. (Aug. 23, 2002 KMC Telecom Reply Comments at 4.)

The Louisiana record further established that such a policy is particularly damaging to competition for business customers, as many small business cannot afford to be without DSL service for the period of time it takes BellSouth to process a CLECs' voice order. (May 24, 2002 KMC Reply Comments at 5, R. 1155.) CLEC commenters submitted testimony showing that BellSouth's policy "prevents businesses from switching to [a CLEC's service] because the business cannot afford to be without its data services for the month or more it takes BellSouth to process [a CLEC] UNE order." (*Id.* at 5-6, R. 1155-56.)

Also in Louisiana, MCI established that BellSouth's policies "lock-in" customers. Specifically, MCI showed that, in July 2002, at least 103 residential customers subscribing to BellSouth's DSL service in Louisiana attempted to sign up for MCI's "the Neighborhood." (Aug. 23, 2002 WorldCom Reply Comments at 2-3.) Due to BellSouth's DSL policy, however, BellSouth rejected all of these customers' orders. (August 23, 2002 WorldCom Reply Comments at 2.) MCI also described BellSouth's practice of encouraging customers to enter into long-term arrangements under which customers must pay penalty fees if they attempt to terminate service before the end of the contract term. (Aug. 23, 2002 WorldCom Reply Comments at 2; May 24, 2002 WorldCom Reply Comments at 1, R. 1162.)

This is classically unlawful conduct. When "a monopolist refuses to deal with customers who deal with its rivals," such behavior is "inherently anticompetitive [and] . . . is illegal." *Byars* *v. Bluff City News Co.*, 609 F.2d 843, 858 (6th Cir. 1979); *accord Lorain Journal Co. v. United States*, 342 U.S. 143, 152-53 (1951); *Washington State Bowling Proprietors Ass'n v. Pacific Lanes, Inc.*, 356 F.2d 371, 374-76 (9th Cir. 1966). Because BellSouth is "willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival," *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 610-11 (1985), it is presumptively engaged in classic anticompetitive behavior. This is also the view of the leading antitrust commentators:

> Extraction of an agreement not to deal with any competitor – or the equivalent, refusing to deal with buyers who do – can be exclusionary and particularly damaging where the buyers cannot do without the seller's product or service. We see no convincing justification for a requirement that a customer not deal with a particular rival.

IIIA Philip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 768e6 (1996).

Indeed, the state commissions received ample evidence vividly documenting BellSouth's refusal to deal with customers who deal with its rivals. *Byars*, 609 F.2d at 858. As the Georgia Public Service Commission recognized, "BellSouth is willing to refuse an option to customers even at the risk of losing the customer" ostensibly because it "believes that it will keep enough voice customers that would have otherwise departed for a preferred [competitive carriers] that BellSouth will still come out ahead financially. " *Georgia PSC Order*, No. 11901-U, at 16.

BellSouth's objections to the State's orders based on claims about broadband market power are wholly beside the point, for two reasons. First, the states correctly focused on the imminent harm BellSouth's conduct will inflict upon competition in *local voice services* where BellSouth undoubtedly has market power. *See Kentucky PSC July 12, 2002 Order* at 7-8; *Kentucky PSC Oct. 15, 2002 Order* at 4. The PSCs could not have been clearer regarding that harm. For example, the Kentucky Commission found that BellSouth's practices would enable it "to increase its already considerable market power in the voice market." *Kentucky PSC July 12, 2002 Order* at 7. As the PSC stated, "[o]ur decision reflects *our concern for voice customers in Kentucky* as well as for the preservation of telecommunications competition and the availability of DSL to Kentucky's citizens." *Kentucky PSC Oct. 15, 2002 Order* at 4 (emphasis added); *see also Iglou Internet Servs., Inc. v. BellSouth Telecomm., Inc.*, Case No. 99-484, slip op. at 9 (Ky. PSC Nov. 30, 2000) (citing "[the PSC's] *frequently reiterated* position in favor of telecommunications competition" and finding BellSouth's DSL tariff practices "unacceptable"); *Provision of InterLATA Services by BellSouth Telecomms., Inc.*, Case No. 2001-00105, slip op. at 13-14 (Ky. PSC Apr. 26, 2002) (predicting adverse impact on advanced services market of BellSouth's DSL practices).

Additionally, BellSouth's focus on broadband market power is also mistaken because broadband market power is not a predicate to the competitive harm that "lock in" causes and that the PSCs addressed. Even if there were significant competing suppliers of wholesale broadband services (which there are not), and even if BellSouth were not a principal supplier of broadband services (which it is), BellSouth's telephone customers are nonetheless "locked in" where they also rely upon the BellSouth DSL service. In such cases, the PSC correctly found that telephone competition would be impaired unless BellSouth's DSL practices were restrained.

The D.C. Circuit recently addressed an analogous "lock in" effect, where it upheld the FCC's determination that wireless carriers (which do not have market power) must allow their customers to retain their telephone numbers when they switch carriers. *See Cellular Telecomms. & Internet Ass'n v. FCC*, 330 F.3d 502, 510-11 (D.C. Cir. 2003). The court rejected the carriers' argument that the FCC's order was arbitrary and capricious, reasoning that "having to switch phone numbers presents a barrier to switching carriers," and "consumers 'will find themselves forced to stay with carriers with whom they may be dissatisfied because the cost of giving up their wireless phone number in order to move to another carrier is too high.'" *Id.* at 513 (quotation omitted). Exactly the same problem is presented here: BellSouth's telephone customers will not switch telephone service providers because BellSouth's DSL practices impose high switching costs.

In any event, it is clear that BellSouth has market power in broadband access services. The market for these purposes is local, "the []area in which the seller operates, and to which the purchaser can practicably turn for supplies." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 359 (1963) (emphasis omitted). While cable television systems provide the only material source of competition with DSL services, cable services generally do not serve business customers. *See* Paul J. Roche, *DSL Will Win Where It Matters*, 2001 The McKinsey Quarterly 180, 183 ("More than 80 percent of midsize and small businesses are sufficiently close to a telephone-switching office to subscribe to DSL, whereas cable . . . reaches fewer than 20 percent."). And where cable competition exists, the result is a duopoly in which BellSouth still retains significant market power in the broadband market.

Both before the state commissions and here, BellSouth has been unable to suggest any legitimate basis for its practice. All the state PSCs rejected as unsupported BellSouth's claims that technological limitations justified its restrictive policies, a point BellSouth does not even press here, and one that is unsustainable in light of the fact that Qwest, for example, is willing and able to provide CLEC voice customers its DSL-based services.[6] BellSouth's sole defense is that this exclusionary practice would benefit its bottom line, *see, e.g., Louisiana PSC Order*, No.

[6] *See, e.g., Florida PSC Staff Recommendation*, No. 020507-TL, at 56-61; Rebuttal Test. of Sherry Lichtenberg, *Florida PSC Staff Recommendation*, No. 010507-TL, at 5-9 (filed Dec. 23,

R-26173, at 6. But a tying practice used to preserve monopoly revenue is unlawful when the monopolist simply declines to provide the tied service even though it would be profitable for it to do so. As the Florida PSC found, BellSouth "states that there is *no* profit margin at which it would offer FastAccess service [to CLEC voice customers] and that it would rather lose the customer than provide FastAccess." *Florida Staff Recommendation*, No. 020507-TL, at 24 (citing Florida Competitive Carrier's Association Br. at Ex. 7; BellSouth Response to Staff's Interrogatory No. 28) (emphasis added). ILEC officers have been unusually candid about using bundled offerings to lock in customers and to preserve their market share in local telephone services.[7] It is hard to imagine a less defensible practice.

II. THE STATES HAVE AMPLE AUTHORITY TO RESPOND TO BELLSOUTH'S ANTICOMPETITIVE PRACTICES.

BellSouth argues broadly that under the scheme of "cooperative federalism" set out in the 1996 Act, and the surviving preexisting law concerning federal-state jurisdiction over communications services, the FCC has occupied the field and so the states have no authority to regulate the services at issue here. That is plainly wrong.

A. The States Have Jurisdiction Over Local Telecommunications Services.

To begin, this is foremost a regulation of local voice telephony services. The competitor's local voice services the states here attempt to protect against BellSouth's tying are just that – local voice services. The PSCs have clear and exclusive authority over local telephony and the conditions limiting competition in the service. *See* 47 U.S.C. § 152(b). Sections 251-

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2002); *Georgia PSC Order*, No. 11901-U, at 8-9; MCI's Post-Hearing Br., *Georgia PSC Order*, No. 11901-U, at 27-31; *Florida PSC FDN Order*, No. PSC-02-0765-FOF-TP, at 5-8.

[7] *See, e.g.*, *Investor Briefing for Second Quarter 2003* (SBC Communications Inc., San Antonio, Tex.), July 24, 2003, at 1, 2, 5-6; Statement of Edward Whitacre, CEO, SBC Communications,

252, and the 1996 Act more generally, clearly preserve the PSC's authority to foster local competition in this fashion. *See* 47 U.S.C. § 251(d)(3) ("Preservation of State access regulations"); *id.* § 252(e)(3) ("Preservation of authority": "nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement"); *id.* § 261(b) (preservation of state regulatory powers to fulfill requirements of local competition requirements); *id.* § 261(c) (no preclusion of state regulation "for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part"); 1996 Act, § 601(c), 110 Stat. at 14 (the 1996 Act "shall not be construed to modify, impair, or supersede Federal, *State*, or local law unless *expressly so provided* in such Act or amendments.") (uncodified note to 47 U.S.C. § 152) (emphasis added); *see also Michigan Bell Tel. Co. v. MFS Intelenet of Mich., Inc.*, 339 F.3d 428 (6th Cir. 2003); *AT&T Communications v. BellSouth Telecomms. Inc.*, 238 F.3d 636, 642 (5th Cir. 2001); *MCI Telecomms. Corp. v. US West Communications*, 204 F.3d 1262, 1266 (9th Cir. 2000); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (savings clauses are "the best evidence of Congress' preemptive intent"). Even BellSouth does not argue that the Act expressly limits state actions such as the PSC's, and, as discussed below, no inconsistency between federal and state requirements exists that would support a finding of preemption.

B. States Have Jurisdiction Over Local and Jurisdictionally Mixed Services.

Additionally, the DSL telecommunications services and ISP information services at issue here are both jurisdictionally mixed: When an ISP uses the services, it delivers information to its

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Q1 2003 SBC Communications Earnings Conference Call (Apr. 24, 2003), *available at* 2003 WL 18979281.

customers that originates on servers within the state as well as information that originates beyond the state's boundaries. Much if not most of DSL service consists of local communications: Web browsing often involves a communication between an end user and a local server that stores downloaded (or "cached") website information; many websites accessed directly by customers are located within the consumer's state; and virtually all DSL calls are initiated by a communication to a local server. Since DSL service also consists of communications directly to out-of-state websites, and for this reason it is "jurisdictionally mixed"—that is, it combines intrastate and interstate communications—as the FCC itself has concluded. *See ISP Remand Order* ¶¶ 14, 52 & nn.97-98 ("the interstate and intrastate components [of ISP] cannot be reliably separated"); *see also Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 543 (8th Cir. 1998) (affirming FCC's determination that ISP-bound traffic is jurisdictionally mixed); *GTE Order* ¶¶ 22-29. The ILECs themselves have acknowledged in proceedings concerning the BellSouth ADSL service at issue here that "communications through the Internet using ADSL service may be intrastate, interstate, or international." *Bell Atl. Tel. Cos. Order* ¶ 11.

BellSouth is wrong when it claims that the FCC has exclusive jurisdiction because these jurisdictionally mixed services involve in part interstate communications. Even before the 1996 Act, that statement was true only for facilities and services used *exclusively* for interstate communications. But the FCC has never had exclusive authority when, as here, services and facilities carry *both* interstate and intrastate communications. *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 373-76 (1986); 47 U.S.C. § 152(b).

Sections 1 and 2(b) of the Communications Act empower the FCC to regulate interstate communications and preserve state authority to regulate intrastate communications. 47 U.S.C. §§ 151, 152(b). In rejecting the same argument BellSouth makes here, the Supreme Court explained that the FCC does not have "plenary" authority just because it is regulating interstate communications, because "virtually all telephone plant that is used to provide intrastate service is also used to provide interstate service, and is thus conceivably within the jurisdiction of both state and federal authorities." *Louisiana PSC*, 476 U.S. at 360; *see also, e.g.*, *California v. FCC*, 39 F.3d 919, 931-32 (9th Cir. 1994) ("*California II*"); *California v. FCC*, 905 F.2d 1217, 1241-43 (9th Cir. 1990) ("*California I*"); *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 880 F.2d 422, 428-29 (D.C. Cir. 1989) ("*NARUC*"); *North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036, 1043 (4th Cir. 1977). "In reality, since most aspects of the communications field have overlapping interstate and intrastate components, these two sections do not create a simple division [of authority]; rather they create persistent jurisdictional tension." *Public Util. Comm'n of Tex. v. FCC*, 886 F.2d 1325, 1329 (D.C. Cir. 1989).

In resolving this jurisdictional tension, "the *only* limit that the Supreme Court has recognized on a state's authority over intrastate telephone service occurs when the state's exercise of that authority negates the exercise by the FCC of its own lawful authority over interstate communication." *NARUC*, 880 F.2d at 429; *see* 47 U.S.C. § 261(c) (preserving state regulation of intrastate services if not "inconsistent" with federal statute or implementing regulations); *id.* § 251(d)(3). Preemption exists only when the FCC affirmatively asserts preemption, and it can do so only when "it can show that the state regulation negates a valid federal policy" and "only to the degree necessary to achieve it." 880 F.2d at 430-31 (emphasis omitted); *see California II*, 39 F.3d at 931-32. The FCC bears the burden of meeting this showing. 880 F.2d at 431; *GTE Order* ¶ 28. And even the FCC's exercise of its express preemption power in such circumstances does not preclude all state regulation, but only that "inconsistent" or "conflict[ing]" with the "valid federal regulatory objective." *Illinois Bell Tel. Co.* v. *FCC*, 883 F.2d 104, 114-15 (D.C. Cir. 1989); *Michigan Bell Tel. Co.*, 339 F.3d at 434-35.

Neither does Commission silence about "jurisdictionally mixed" traffic imply preemption. To the contrary, in the absence of FCC preemption, states are free to regulate jurisdictionally mixed telecommunications traffic. *See Southwestern Bell*, 153 F.3d at 542 (rejecting argument that FCC's decision not to preempt state regulation of jurisdictionally mixed service "amounts to a dereliction of the [FCC's] obligation to retain exclusive jurisdiction over interstate communications and forces state regulatory commissions to overstep their authority"); *Southwestern Bell Tel. Co. v. Public Util. Comm'n of Texas*, 208 F.3d 475, 480 (5th Cir. 2000) (rejecting argument that FCC preempted all regulation of Internet traffic based on its interstate component); *US West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1122-23 (9th Cir. 1999).[8]

Finally, the 1996 Act did not change the law in this area, as the citation to many post-1996 Act cases above makes clear. Rather, as we indicated in the previous section, *supra* p. 13, the 1996 Act expressly preserved the states' authority except to the extent expressly altered by the substantive provisions of the 1996 Act. And none of those provisions addressed in relevant respects the treatment of jurisdictionally mixed services.

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[8] The Commission has declined to preempt state regulation of jurisdictionally mixed services when it has not found a pressing policy need supporting uniform federal regulation over those services. *See, e.g., In re Furnishing of Customer Premises Equip. by the Bell Operating Tel. Cos. & the Independent Tel. Cos.*, 2 F.C.C.R. 143, ¶¶ 121-129 (1987), *pet. for review denied, Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104 (D.C. Cir. 1989); *In re Filing & Review of Open Network Architecture Plans*, 4 F.C.C.R. 1, ¶¶ 276-180 (1988), *pet. for review denied, State of California v. FCC*, 4 F.3d 1505 (9th Cir. 1993); *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Inter-Carrier Compensation for ISP-Bound Traffic*, 14 F.C.C.R. 3689 (1999).

In sum, these orders are commonplace exercises of state authority over local and jurisdictionally mixed communications services, and BellSouth's claim that the FCC has occupied the field in this area is frivolous.

III. THE STATES' ORDERS ARE NOT OTHERWISE PREEMPTED BY FEDERAL LAW.

As we have shown, because the FCC has not occupied the field in this area there can be preemption only if the state rule "negates a valid federal policy," and "only to the degree necessary to achieve it." *NARUC*, 880 F.2d at 430-31; 47 U.S.C. § 152(b); *id.* § 261(c). But BellSouth's attempts to manufacture an inconsistency between FCC policy and the states' orders are here frivolous. The state rulings conflict with neither the *Triennial Review Order,* the FCC's regulatory treatment of "information services," the FCC's treatment of federally tariffed services, nor any other federal rule. To the contrary, the state regulation *advances* federal policies promoting local competition and promoting deployment of broadband facilities. The fact that the FCC has not yet determined that BellSouth's conduct is unlawful under federal rules of course does not establish that the conduct is federally protected.

A. The States Orders Do Not Violate the *Triennial Review Order.*

BellSouth wrongly claims that in *Triennial Review Order* the FCC preempted the states from issuing any regulation in this area. Specifically, BellSouth claims that the state orders should be preempted because, under the *TRO*, "states may not impose unbundling obligations that this Commission has considered and rejected" and because the state orders impair the Commission's policy regarding "the need to preserve incentives to engage in facilities-based competition." Petition at 10, 15. This argument is wrong on two grounds: the state rules at issue here are not unbundling rules; and in any event the FCC did not purport to preempt all state unbundling rules in the *TRO*.

First, none of the state orders at issue require any unbundling. The states merely required BellSouth not to restrict its DSL offering. BellSouth says this is tantamount to requiring the unbundling of the low-frequency portion of the loop. But that is plainly not the case. The orders presumed that the CLECs would have to secure and pay for the *entire* loop. Indeed, as the Florida PSC made clear, BellSouth remains free to offer its DSL services over one loop and give CLECs an entirely different loop. BellSouth in fact acknowledges that the CLEC must lease the entire loop and that the state requirements apply to the "unbundled loop," not to any new UNE related to the low-frequency portion of the loop. Petition at 29-30. Nor is this a case in which CLECs who lease loops subsequently deny access to BellSouth to provide broadband functionality to the customer. The sum of the matter is that the *Triennial Review Order* said nothing about ILECs' ability to restrict DSL service to its own telephony customers.

In any event, even if the state commissions had ordered BellSouth to unbundle the low frequency portion of loops as separate UNEs – which they did not – that still would not be a ground for preemption. BellSouth refers to the Commission's statement that it "believe[s] it is unlikely that [a decision to provide unbundling beyond that provided by federal law] would fail to conflict with . . . the federal regime." *TRO* ¶ 195. But as the Commission has made clear in defending the *TRO* in the appellate court, no appeal of that prediction is ripe, because the Commission did not in the *TRO* preempt any state law, and did not even state definitively that it would do so in the future. Instead, it left the question for another day, permitting the states to issue whatever rules they felt appropriate, with carriers free to bring those rules to the Commission if they felt they were preempted. That is a palpably inadequate ground to support

BellSouth's claim here that a particular state rule has already been preempted by the FCC. Indeed, for "*existing* state requirements" such as those in the orders at issue, the Commission noted that only "in some instances" would a conflict exist requiring preemption. *Id.*

Moreover, the indications the Commission gave in the *TRO* powerfully support the view that these state rules (even if viewed incorrectly as unbundling rules) would *not* be preempted. For the Commission held as mandated by the 1996 Act that preemption would exist arise only where state orders "'substantially prevent' the implementation of the federal regime," *TRO* ¶ 192 n.611 (quoting *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 806 (8th Cir. 1997), *rev'd in part*, 525 U.S. 366 (1999)), and only if a federal policy were "negated" through a clear inconsistency with federal law. *See NARUC*, 880 F.2d at 428-29; *cf.* 47 U.S.C. § 252(d)(3). And, to repeat, nothing in these state orders remotely impedes or negates any federal policy. To the contrary, the state rules *support* federal policy both by removing impediments to voice competition, and by striking at BellSouth's efforts to preserve its narrowband voice offering by impeding the development of VoIP services.

BellSouth also points to an alleged conflict between the state orders and one of the Commission's "core policies" of "the need to preserve incentives to engage in facilities-based competition." Petition at 15-16. This is a frivolous claim. By tying broadband offerings to BellSouth's narrowband voice service, BellSouth's practice is designed to *impede* broadband deployment in an effort to prop up the value of BellSouth's narrowband network. As such, the state rules here strongly enforce federal policy of promoting deployment, and in particular promoting broadband deployment. Additionally, the claim that they are targeted only at UNE-P is false. The proscribed tying arrangements apply equally to would-be UNE-L providers as to UNE-P providers. In any event, and apart from all of that, it obviously does not advance FCC policy to make UNE-P unattractive through this anticompetitive practice in situations in which the FCC (and the states) have concluded that competitors will be unable economically to serve the market unless they have access to UNE-P.[9]

B. The States Have Ample Power To Prohibit Anticompetitive Practices Even if They Involve An Information Service.

BellSouth also claims that "[t]he Commission has precluded state regulation of interstate information services" and thus has preempted any state regulations affecting retail DSL services. Petition at 19. This is doubly wrong. The conduct at issue here does not concern exclusively interstate information services, and, even if it did, states are not automatically preempted from regulating such services.

1. The State Rules Do Not Principally Address Interstate Information Services.

To begin, for three reasons the state rules are not principally regulations of interstate information services.

First, they are instead principally regulations designed to prevent an anticompetitive practice designed to deter competition in the narrowband voice market, and the voice services affected by this conduct are indisputably telecommunications services.

Second, as indicated above, some of the information services involved are intrastate, not interstate.

[9] BellSouth also refers to the Commission's conclusion in the *TRO* that the existence of line-sharing might impede "innovative line-splitting arrangements." Petition at 16. But this is a reference to the Commission's view that the relevant incentive depends upon whether the CLEC must pay for the entire loop, and then try to secure revenues to justify the expenditure, or is entitled through line-sharing to secure and pay for less than the entire loop. *See TRO* ¶¶ 260, 263. But under the state orders here, the CLEC must pay for the entire loop, and so under that reasoning it has the maximum incentive to innovate, including through use of line-splitting arrangements. The state orders thus do not conflict with any policy that led to the elimination of line-sharing.

Third, just because BellSouth has chosen to bundle its DSL transmission telecommunications services[10] with its ISP information services does not mean that the resulting service offering is only or even primarily an information service. The Commission has long held to the contrary that carriers cannot shield their telecommunications services from telecommunications regulation in this manner. *E.g., Frame Relay Order* ¶ 42. While the Commission has tentatively concluded that this policy should be reversed in the *Broadband Framework NPRM,* it has not acted on that controversial tentative conclusion. And in the parallel situation presented by cable modem services, the courts have found that the service is both a telecommunications service and an information service. *See Brand X Internet Servs. v. FCC,* 345 F.3d 1120 (9th Cir. 2003) (pet'n for review pending); *AT&T Corp. v. City of Portland,* 216 F.3d 871 (9th Cir. 2000).

Here, of course, it is BellSouth's bottleneck control over local access telecommunications facilities used to provide broadband services that gives it the power to engage in the discriminatory practice at issue, and these are telecommunications services, not information services. If the only services at issue here were BellSouth's ISP information services, BellSouth would have no power to engage in this discriminatory conduct. The FCC should not countenance BellSouth's effort to bundle that local transmission service with an information service, then in turn tie *that* bundle to its local voice service and claim the whole bundled package is immune from state regulation (and, apparently, federal regulation as well) because it is an information service. It is not.

[10] There is no dispute that such services are telecommunications services. *See, e.g., Broadband Framework NPRM.*

2. <u>The States Are Not Preempted From Regulating Information Services.</u>

In any event, even if this were simply regulation of an information service, BellSouth is wrong to claim that states are "automatically" preempted from regulating interstate information services. *California I* held precisely to the contrary. There, the Ninth Circuit set aside FCC orders that assertedly "preempted nearly all state regulation of the sale of enhanced services." 905 F.2d at 1235. The court rejected the same arguments that BellSouth has offered here, finding that section 2(b) preserved a state role with respect to information services. *Id.* at 1240. It also rejected the argument that because intrastate and interstate communications are affected by any state regulation, broad preemption was warranted. *Id.* It concluded instead that state regulation of information services affecting interstate communications is not preempted unless the FCC issues a rule that is "narrowly tailored to preempt *only* such state regulations as would negate valid FCC regulatory goals." *Id.* at 1243.[11]

The FCC's own regulation of information services permit a state role inconsistent with BellSouth's broad preemption argument. In both the *Cable Modem Ruling* ¶ 33, , and the *Broadband Framework NPRM* ¶ 13, the FCC (wrongly, in our view) determined that the high-speed Internet access service over self-provided transmission facilities is exclusively an information service. In both orders, however, the FCC also recognized that the information service regulatory classification did not automatically mean that state regulation was preempted, and instead sought comment on "whether we should use our preemption authority to preempt specific state laws or local regulations." *Cable Modem Ruling* ¶ 99; *see also Broadband Framework NPRM* ¶ 62 (same).

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[11] *See also Southwestern Bell*, 208 F.3d 475 (states may regulate interstate ISP traffic); *Michigan Bell Tel. Co.*, 339 F.3d at 434.

In fact, the Commission has preempted state regulation of interstate information services only when states have attempted to "impose common carrier tariff regulation on a carrier's provision of enhanced services." *Computer II* ¶ 83 n.34. Here the state commission orders have not engaged in common carrier tariff regulation of BellSouth's DSL service. They simply prevent BellSouth from tying its DSL services to its voice services. As the Louisiana PSC stated, it "does not regulate the rates or pricing of BellSouth's wholesale or retail DSL service and does not establish any pricing for BellSouth's DSL." *Louisiana PSC Order*, No. R-26173, at 12, 15; *see also Florida PSC Staff Recommendation*, No. 020507-TL, at 15; *Florida PSC FDN Order*, No. PSC-02-0765-FOF-TP, at 11.

For that reason, there is a clear distinction between the kind of antidiscrimination regulation at issue here and, for example, the preempted common carrier regulation imposed by the Minnesota PUC directly on a VoIP information service. *See Vonage Holdings Corp. v. Minnesota Pub. Util. Comm'n*, 290 F. Supp. 2d 993 (D. Minn. 2003). There the Minnesota PUC improperly attempted to subject Vonage to the traditional panoply of common carrier obligations that it applied to all telecommunications carriers. The state commissions here have attempted no such thing with respect to BellSouth's DSL service.

C. The States Order Is Consistent With BellSouth's Tariff.

BellSouth's argument that the states' orders conflict with or alter its tariffs is doomed by the tariffs' own language. Because the orders do not require action contrary to the tariff, claims based on the tariff must fail. *See Access Telecom, Inc. v. MCI Telecomms. Corp.*, 197 F.3d 694, 711 (5th Cir. 1999) (PUC action not preempted by federal tariff where "[i]t does not concern the provision of services which are covered by the filed tariff, but rather . . . actions outside the scope of the tariff").

The "conflict" to which BellSouth points does not exist. BellSouth's argument relies solely on the tariff language that BellSouth will provide service to an "end-user premises" that is serviced by an "existing, in-service, Telephone Company *provided* exchange line *facility*." *BellSouth Telecomms. Inc.*, Tariff F.C.C. No. 1, § 7.2.17(A) (May 31, 2002) ("BellSouth Tariff") (emphasis added). BellSouth claims that this tariff language is inconsistent with providing the tariffed service over BellSouth loops leased to a CLEC. BellSouth is plainly wrong about this.

The most natural reading of this language to the contrary is that BellSouth will offer DSL transport service only over its own existing, active facilities. That is, it will not offer the service over facilities built, owned, and maintained by other carriers (such as neighboring incumbent carriers) and will not offer the service over inactive facilities. This reading is reinforced by the definition of an "in-service exchange line facility," which is the Central Office line equipment and all plant facilities up to the network interface device (which are clearly owned and provided by BellSouth, not a competitive carrier). *Id.* at 20.

But when a CLEC offers service over UNE-P, BellSouth retains the ownership of the line, including obligations to maintain and repair it and the ability to account for it as an asset (and depreciate it in the income statement). That is, there remains a BellSouth-"provided exchange line facility." Indeed, BellSouth does not dispute that it provides UNE-P services to competitive carriers over its facilities, which necessarily requires that BellSouth is continuing to provide its facility no matter what services it supports.

BellSouth further contradicts its own argument when it acknowledges that it will provide DSL service when a competitive carrier "resells" BellSouth's retail service (rather than leasing UNEs). In both cases, BellSouth provides the exchange line facility, and the competitive carrier provides service to customers employing that BellSouth facility. Furthermore, the tariff specifically states that a CLEC can designate the end-user premises. BellSouth Tariff § 7.2.17(A) (Addendum 1). This language would make no sense if a CLEC could not make use of a line that is a BellSouth-"provided exchange line facility." BellSouth Tariff § 7.2.17(A) (Addendum 1).

Even if the tariff's terms were not perfectly clear and consistent with the PSC orders and with BellSouth's own understanding, any ambiguity in the tariff must be resolved against BellSouth. *See Norfolk & W. Ry. v. B. I. Holser & Co.*, 629 F.2d 486, 488 (7th Cir. 1980) ("'tariff[s] should be construed strictly against the carrier since the carrier drafted the tariff'"); *Bell Atl.-Del. Corp. v. Global Naps, Inc.* ¶ 22 ("ambiguous tariff provisions must be construed against the drafting carrier").

If BellSouth truly wants to write its tying practice into its tariff – and thus have facilities "provided" by BellSouth exclude BellSouth's facilities that serve CLECs' telephony customers – then BellSouth must rewrite its tariff to express clearly this counter-intuitive and anticompetitive outcome. A new tariff filing that expressly limited the DSL service then would be subject to review by the FCC and challenge by users of the service, *see* 47 U.S.C. §§ 204-205, which would prompt a broad investigation of the anticompetitive effect of BellSouth's practice, whether it is "reasonable" under federal law, and whether it met the federal requirement that BellSouth make its services generally available "upon reasonable request." 47 U.S.C. § 201(a) & (b). There is no reason to think that a tariff amendment would survive such a challenge. Plainly it would not.

D. The State Orders Violate No Other Federal Policy.

Nor do the state rulings violate any other FCC policy. BellSouth points to rulings made in its section 271 petitions authorizing it to provide in-region long-distance services. In giving BellSouth long-distance authority in Georgia and Louisiana, the FCC rejected competitors' claims that the applications should be denied because of BellSouth's tying practices. In so ruling, the Commission applied its section 271 procedural rule that it would consider only previously established requirements in addressing section 271 applications, and it stated that it had not yet had opportunity to pass on whether this practice violated FCC rules. *Georgia-Louisiana 271 Order* ¶ 157. Obviously, a ruling that the FCC has not yet had occasion to rule on the legality of a practice is not the same thing as a ruling that the practice is legitimate.

Next, BellSouth points to the FCC's *Line Sharing Order*, which the FCC itself referenced in its section 271 orders for the proposition that it had not yet ruled on this ILEC practice. But there, the FCC expressly concluded that additional state regulation in this area would be consistent with its rules, finding that if "AT&T believes that specific incumbent behavior constrains competition in a manner inconsistent with the Commission's line sharing rules and/or the Act itself, we encourage AT&T to pursue enforcement action." *Line Sharing Reconsideration Order* ¶ 26.

As we just stressed, the fact that the particular federal regulations at issue in that proceeding did not impose a requirement does not logically mean that an independent state regulation that does so is "inconsistent" with federal law or "negates" a "valid federal policy," *NARUC*, 880 F.2d at 431 – as confirmed and emphasized by the federal statutory provisions ensuring that states may impose state law requirements on telecommunications carriers in addition to those imposed by federal law. *See* 47 U.S.C. §§ 251(d)(3), 252(e)(3), 261(b) & (c). The FCC's finding that BellSouth's conduct is not unlawful under existing federal rules does not establish that the conduct is required or desirable. The sum of the matter is that there is no federal policy encouraging BellSouth to tie its DSL service to its provision of voice telephone services. In the absence of such a policy, there simply can be no conflict or inconsistency between the PSC order and FCC policy. *See Michigan Bell*, 339 F.3d at 434-35 (for "jurisdictionally-mixed" ISP traffic, states entitled to regulate because no conflicting federal requirement exists).

CONCLUSION

For the foregoing reasons, the Commission should deny BellSouth's "Emergency Request for Declaratory Ruling."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mark D. Schneider, hereby certify that I have this 30th day of January, 2004, caused a true copy of the Comments of MCI to be served on the parties listed below via first class US Mail postage prepaid:

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